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October 28, 2008

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 30, 2008

Case Number: TSO-0654

This decision concerns the eligibility of XXXXXXXXXXXX ("the Individual") for a DOE access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's request for an access authorization should be granted. For the reasons detailed below, it is my decision that the Individual's request for an access authorization should be denied.

**I. BACKGROUND**

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) local security office (LSO), informing the Individual that information in the possession of the DOE created a substantial doubt pertaining to his eligibility for an access authorization.<sup>1</sup> See Notification Letter, June 23, 2008.

The Notification Letter cites a security concern under 10 C.F.R. § 710.8(l) (Criterion F). Criterion F pertains to false statements or misrepresentations by an individual during the course of an official inquiry regarding the individual's eligibility for access authorization, including responses during personnel security interviews or on security questionnaires. Such statements raise serious doubts regarding the individual's honesty, reliability, and trustworthiness. See 10 C.F.R. § 710.8(f). The Individual signed and submitted a Questionnaire for National Security Positions (QNSP) on April 20, 2007, on which he indicated, *inter alia*, that he had not used any illegal drugs within the last seven years. DOE Ex. 7. The Letter cites the Individual's admission during a personnel security interview (PSI) that he failed to list his August 2006 marijuana usage on the April 2007 QNSP because "he did not want his use out in the open." See Notification Letter.

The Notification Letter further stated that the Individual's statements regarding his marijuana use raised security concerns under 10 C.F.R. § 710.8(k) (Criterion K). Criterion K pertains to information indicating that an individual has "trafficked in, sold, transferred, possessed, used, or experimented with" illegal substances. See 10 C.F.R. § 710.8(k). In this case, the Letter cited

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<sup>1</sup> Access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

the Individual's admission that he smoked marijuana at his nephew's August 2006 wedding as a security concern. The Letter also cited as security concerns under Criterion K the Individual's statements that he associates with at least one person who smokes marijuana and did not plan to disassociate himself from that person, and that he may possibly use marijuana again in the future.

Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual's Letter, July 18, 2008. At the hearing, the Individual presented his own testimony. He brought forth no other witnesses. The DOE counsel did not present any witnesses.

## II. HEARING TESTIMONY

The Individual discussed the security concerns cited in the Notification Letter. The Individual disputed the statements in the Notification Letter regarding his marijuana use at his nephew's wedding. He admitted that he smoked marijuana at the wedding, but maintained that the wedding took place in April 2007, not August 2006.<sup>2</sup> Transcript ("Tr.") at 7-8. The Individual recalled informing both the Office of Personnel Management (OPM) investigator who conducted his background investigation and the interviewer during his PSI that the wedding "possibly" took place in August 2006. *Id.* However, the Individual "had the dates confused." *Id.* He added, "I think it was still just confusion on my part. I think I took it a little more lightly than I should have ... on getting my facts straight, making sure that I understood, you know, when it happened." Tr. at 9. The Individual stated that he did not intentionally provide false information. He stated that if he intended to withhold or conceal the information regarding his marijuana use, he would not have disclosed the use to the OPM investigator that he smoked marijuana at his nephew's wedding.

According to the Individual, the April 2007 marijuana use was unplanned. He stated, "I think I just got wrapped up in all the commotion and the excitement with seeing friends and family that I hadn't seen in a long time, and it just kind of happened." Tr. at 24. When asked why he used marijuana eight days after signing and submitting a QNSP, he stated, "I don't have a good answer ... it just kind of happened." Tr. at 25. The Individual last used marijuana in September 2008, approximately one month prior to the hearing. Tr. at 14-15. The use occurred at his home during a party with family and friends. *Id.* When asked why he smoked marijuana again just before the hearing in this matter, the Individual again responded, "I don't have a good answer for that ... it just kind of happened." Tr. at 29. The Individual added, "it's not something that's done everyday ... it happened in April [2007], and it happened in September [2008]." Tr. at 32-33.

Prior to April 2007, the Individual had not used marijuana in "at least" ten or 12 years. Tr. at 23. He does not seek out or purchase marijuana. Tr. at 33. The marijuana he used in April 2007 and September 2008 was provided by friends. *Id.* The Individual knows others who use marijuana and does not intend to disassociate from them. Tr. at 16, 31. He stated, "I would never turn my back on my friends and family." Tr. at 16.

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<sup>2</sup> Prior to the hearing, the Individual submitted a copy of the program from his nephew's wedding indicating that the wedding took place on April 28, 2007. *See* Indiv. Ex. A.

The Individual did not believe that using marijuana from time to time was significant. He stated, “to me, [somebody] ‘doing drugs’ isn’t somebody that has, you know, smoked a little marijuana in the past. When you say ‘drugs’ to me ... my opinion is [that is] somebody that is using cocaine everyday, that is on meth, and having real issues.” Tr. at 13. The Individual was unsure whether he would use marijuana in the future, but stated it was “possible” he would use it. Tr. at 14. He stated, “I can’t answer yes, and I can’t answer no to that question.” Tr. at 32. The Individual stated that he would not be willing to sign a form certifying that he will refrain from using illegal drugs or associating with other individuals who use illegal drugs in the future. Tr. at 29.

### **III. STANDARD OF REVIEW**

The regulations governing the Individual’s eligibility for an access authorization are set forth in 10 C.F.R. Part 710, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” An individual is eligible for access authorization if such authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). “Any doubt as to an individual’s access authorization eligibility shall be resolved in favor of the national security.” *Id.* See generally *Dep’t of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of national security” test indicates that “security clearance determinations should err, if they must, on the side of denials”).

Under Part 710, the DOE may suspend an individual’s access authorization where “information is received that raises a question concerning an individual’s continued access authorization eligibility.” 10 C.F.R. § 710.10(a). Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. Once a security concern is raised, the individual has the burden to bring forward sufficient evidence to resolve the concern.

In considering whether an individual has resolved a security concern, the Hearing Officer considers various factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

### **IV. ANALYSIS**

#### **A. The Security Concerns – Criteria F and K**

As stated above, Criterion F concerns involve false statements or misrepresentations by an individual during the course of an official inquiry regarding the individual’s eligibility for access authorization, including responses during personnel security interviews or on security questionnaires. Such statements or misrepresentations raise serious doubts regarding the individual’s honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what

extent that individual can be trusted again in the future. *See, e.g., Personnel Security Hearing, Case No. VSO-0013*, 25 DOE ¶ 82,752 at 85,515 (1995); *Personnel Security Hearing, Case No. VSO-0281*, 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, 27 DOE ¶ 83,030 (2000).

In addition, it is beyond dispute that use of illegal drugs raises security concerns under Criterion K. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House) (the Adjudicative Guidelines), Guideline H, ¶ 24 (“Use of an illegal drug ... can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.”); *see also Personnel Security Hearing, Case No. VSO-0113*, 25 DOE ¶ 85,512 (1995) (“The drug user puts his own judgment above the requirements of the laws, by picking and choosing which laws he will obey or not obey. It is further the concern of the DOE that the drug abuser might pick and choose which DOE security regulations he will obey or not obey with respect to protection of classified information.”).

In light of the Individual’s admission that he used marijuana at his nephew’s wedding, the LSO was justified in invoking Criterion K. In addition, given the Individual’s statements to the OPM investigator and the PSI interviewer that the wedding took place in August 2006, approximately eight months prior to his submission of the QNSP, the LSO had grounds to invoke Criterion F. The only issue remaining is whether the Individual has adequately mitigated the security concerns.

## **B. Whether the Security Concerns Have Been Mitigated**

Regarding Criterion F, I find that the Individual has not mitigated the security concern. By providing a copy of his nephew’s wedding program, the Individual established that his marijuana use at his nephew’s wedding took place on April 28, 2007, after the date on which he signed the QNSP. Accordingly, that aspect of the Criterion F concern has been resolved. However, the remaining question is whether he has substantiated that there was no other use in the previous seven years and, therefore, that he did not lie on the QNSP.<sup>3</sup> The Individual asserted at the hearing that he had not used marijuana in at least ten or 12 years prior to April 2007. Tr. at 23. Given the complete absence of corroborating testimony or other documentation, however, the evidence on this point is thin. I would note that it is a fair conclusion that the Individual associated with friends or family who use marijuana prior to the April 2007 incident, and the Individual has no moral conviction against the use of marijuana. Given these factors, there is simply insufficient information in the record to resolve the doubts on this issue raised by the Individual’s recent marijuana use. *See, e.g. Personnel Security Hearing, Case No. VSO-0481*, 28 DOE ¶ 82,830 (2001) (testimony of supervisor and social worker insufficient to corroborate individual’s assertion that he no longer used marijuana). Accordingly, I find the Individual has not mitigated the Criterion F concern cited in the Notification Letter.

In addition, I am unable to find that the Individual has mitigated the Criterion K concern. The recency of the Individual’s marijuana use is of particular concern. Not only did the Individual use marijuana in April 2007, he also, by his own admission, used marijuana in September 2008,

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<sup>3</sup> A factor in the Individual’s favor is that he self-reported the April 2007 marijuana use to the OPM investigator and at the hearing admitted to subsequent marijuana use. However, this alone is insufficient to resolve the concern here.

just one month prior to the hearing. In addition, the Individual has friends who use marijuana and has no intention of disassociating with them. Finally, the Individual indicated that he does not believe occasional marijuana use is a problem and he was unsure whether he would use marijuana again in the future. These facts all demonstrate a complete disregard for the seriousness not only of DOE policies against illegal drug use, but also of laws, rules and regulations pertaining to illegal drug use in general. This calls into question whether the Individual will follow all applicable laws, rules and regulations, or will choose to comply only with those with which he agrees. Such a lax attitude toward DOE security requirements and laws, rules and regulations is simply unacceptable for a holder of a DOE access authorization. Given these facts, I cannot find that the Individual has mitigated the Criterion K concern.

## **V. CONCLUSION**

Upon consideration of the record in this case, I find that there was evidence that raised doubts regarding the Individual's eligibility for a security clearance under Criteria F and K. I also find that there is insufficient evidence in the record to fully resolve those doubts. Therefore, I cannot conclude that granting the Individual an access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the Individual's request for an access authorization should be denied.

Diane DeMoura  
Hearing Officer  
Office of Hearings and Appeals

Date: October 28, 2008